IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. GEOFFREY CLARK HUNTER, Petitioner.	)	2 CA-CR 2006-0405-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200401698

Honorable Boyd T. Johnson, Judge

REVIEW GRANTED; RELIEF DENIED

Harriette P. Levitt — Tucson
Attorney for Petitioner

E S P I N O S A, Judge.

¶1 A jury found petitioner Geoffrey Clark Hunter guilty of third-degree burglary and theft of property valued between $3,000 and $25,000. Hunter waived his right to a jury determination of aggravating sentencing factors and admitted three prior felony convictions. The trial court enhanced his sentences on the basis of two prior convictions and imposed concurrent, presumptive prison terms of ten and 11.25 years. We affirmed his convictions

and sentences on appeal. *State v. Hunter*, No. 2 CA-CR 2005-0418 (memorandum decision filed Sept. 15, 2006).

¶2 Hunter filed a timely notice of post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. In the petition appointed counsel subsequently filed on his behalf, Hunter alleged trial counsel had rendered ineffective assistance by failing to object when the state formally alleged his prior felony convictions on the day before trial and by failing to object when the state called Hunter's codefendant, Troy Ross, as a witness at trial without prior notice or disclosure of Ross's anticipated testimony. This petition for review follows the trial court's denial of Hunter's request for an evidentiary hearing and denial of relief, rulings we will not disturb unless the trial court clearly abused its discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶3 We view the facts in the light most favorable to upholding the trial court's order. *See State v. Stanley*, 123 Ariz. 95, 99, 597 P.2d 998, 1002 (App. 1979) (appellate court views facts necessary to disposition of appeals and petitions for review in light most favorable to sustaining jury's verdict). Hunter had three prior felony convictions. Inexplicably, the state did not formally allege those convictions until the day before Hunter's trial commenced in October 2005. On the same date, the state also belatedly alleged Hunter had committed the present offenses while on release. Earlier, the state had offered Hunter a plea agreement, which Hunter had rejected. He contends he would have

accepted the offered plea[1] had the state timely filed the allegation of prior convictions so he would have been aware of the possible sentences he faced if convicted at trial.

¶4 Hunter claims trial counsel was ineffective because, although counsel "objected to the untimely filing of the notice of committing an offense on probation, parole, or other kind of release . . . he did not object to the late filing of the allegation of prior convictions." We reject Hunter's claim primarily because the trial transcript does not bear out his assertion. Despite its apparent minor inaccuracies, the transcript nonetheless shows defense counsel first agreed that Hunter's prior convictions could be used against him for impeachment purposes should he testify at trial, but not also for enhancement. Counsel stated:

> But *as far as allegation of any priors* or the fact that they're going to allege that this was committed while on release, we're going to have to object based on notice—receiving this notice the day of a jury trial. I do not believe it's timely or it lead [sic] to additional preparation of this case. This might affect the way we view this case, might affect any plea offers that would have been considered. So just on the issue of timeliness we have to object.

[1]Hunter states the plea offer conveyed to him provided for a presumptive sentence of 3.5 years. On the first day of trial, however, the prosecutor stated "the offer that was made to him was guilty to theft, a class 3 repetitive felony with one prior felony conviction." Pursuant to A.R.S. § 13-604(B), the presumptive sentence for that offense was 6.5 years, with a minimum sentence of 4.5 years and a maximum of thirteen years. That portion of the trial court record is not before us, hence we cannot resolve the conflict, but our resolution of this case does not require that we do so.

¶5 In accordance with A.R.S. § 13-604(P),[2] however, the trial court rightly questioned defense counsel about how Hunter would be prejudiced if the court permitted the late filing of the on-release and prior-conviction allegations. As to the latter, the following colloquy occurred:

> THE COURT: Let me ask you a few questions. The statute that applies is 13-604(P), which essentially says if it's less than 20 days before trial I can preclude these filings of prior convictions and of course the allegation of commission upon release. But in order to do so I have to make certain findings.
>
> So, Mr. Allen, let me ask you, were you aware that these prior convictions existed?
>
> MR. ALLEN: Yes, I was aware of some of them, yes, sir.
>
> THE COURT: Were you aware of it because of information received from the state, not information from your client?
>
> MR. ALLEN: Actually I was aware of those by speaking to my client first. [The previous prosecutor] did indicate in one of her letters to me that he did have priors, as she put it, and that was affecting her offer originally.
>
> THE COURT: Does it come as a surprise to you that the state is alleging—I think it was three priors—yes, three priors, two possession [of] drug paraphernalia and one unlawful use of means of transportation? Were you aware of those specific convictions?

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[2]Section 13-604(P) provides that, if an allegation of a prior conviction, dangerousness, or committing the current offense while on release is made less than twenty days before trial, the court "shall allow the allegation" unless it "finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings."

MR. ALLEN: Yes, your Honor.

THE COURT: Had there been any discussion with [the current prosecutor] prior to yesterday about the state's desire to use the priors for enhancement purposes?

MR. ALLEN: No, your Honor.

THE COURT: Okay, so there had been no discussion about enhancement use?

. . . .

MR. ALLEN: No, your Honor. . . . Actually let me clarify that, I'm sorry. They've never been noticed as far as impeachment goes. [The previous prosecutor] was obviously making her offer based on the fact that he did have a prior felony conviction, so I have to say that that's notice as far as knowing about the priors for [] sentencing.

THE COURT: Okay. She used it in the sense of negotiating or attempting to negotiate a plea offer?

MR. ALLEN: Yes, sir.

THE COURT: Did she say, well, if he doesn't take the plea I'm going to allege those?

MR. ALLEN: No, your Honor.

Because the court determined the previous prosecutor had informed defense counsel of Hunter's specific prior convictions in April 2005, more than five months before trial, the court found Hunter had been on notice that the state might allege the priors for enhancement and concluded there was insufficient prejudice to the defense to preclude the state from alleging the priors for that purpose.

¶6 Hunter has not shown that trial counsel's performance deviated from the applicable standard of care. *See generally Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984); *State v. Nash*, 143 Ariz. 392, 399, 694 P.2d 222, 227 (1985). Counsel did object and successfully persuaded the court not to allow the belated allegation that Hunter had committed these offenses while on release. Counsel also objected initially to the state's untimely allegation of priors for enhancement purposes. But then, under direct questioning from the court, counsel could not deny having received actual notice of Hunter's prior convictions from the prosecutor without violating his professional duty of candor toward the tribunal. *See* ER 3.3(a)(1), Ariz. R. Prof'l Conduct, Ariz. R. Sup. Ct. 42, 17A A.R.S. Moreover, when the court implied it might consider postponing the trial if necessary to allow Hunter "to either have further negotiations or prepare to meet [the] evidence" and thus mitigate any possible prejudice, counsel replied that Hunter did not want any additional postponements and "[a]bsolutely" wanted to proceed to trial that day.

¶7 In response to the court's direct questions, counsel answered candidly, as he was ethically bound to do, and the court—being fully advised of all the facts and arguments Hunter now urges on review—made its determination that Hunter would not be sufficiently prejudiced to require precluding the allegation. We fail to see, and Hunter has not shown, how counsel's ethical conduct before the trial court amounted to deficient performance or ineffective assistance. *See generally State v. Borbon*, 146 Ariz. 392, 706 P.2d 718 (1985) (permissible under Rule 32.6(c), Ariz. R. Crim. P., to deny evidentiary hearing when trial court can determine from pleadings, files, and record that no nonprecluded claims present

material issue which would entitle petitioner to relief so further proceedings would serve no purpose).

¶8 Hunter's second contention is that counsel was ineffective for not objecting at trial when the state called a previously "undisclosed witness," Hunter's codefendant, Troy Ross, who had accepted a plea offer the day before Hunter's trial began. In his petition for post-conviction relief, Hunter acknowledged "the State could not have listed Troy Ross as a witness" when it made its pretrial disclosure pursuant to Rule 15, Ariz. R. Crim. P., 16A A.R.S., but contends the state should not have been permitted to call Ross "without any advance notice to defense counsel."

¶9 In the petition itself, Hunter does not allege specific resulting prejudice, only the general abridgement of his constitutional right to due process and failure to preserve the nondisclosure issue for appeal. In his affidavit, Hunter states, "If I had known in advance that my co-Defendant was accepting a plea bargain and [would] be called to testify against me, I never would have rejected the plea offer." But Ross did not plead guilty until the eve of Hunter's trial, and Hunter's wish to have known about it earlier does not establish counsel's ineffectiveness.

¶10 Even if Hunter had shown that trial counsel's failure to object to Ross's testimony fell below the prevailing standard of care, Hunter still was required to prove prejudice. *See Strickland; Nash*. That is, he had to establish that, if trial counsel had objected, the court would have ruled in his favor and precluded Ross from testifying. The state's response to the petition below suggests reasons why such a ruling was hardly assured:

> While the State may not have filed notice of [Ross] in a Rule 15.1 [disclosure], mention of him was included in the discovery packet provided to the Defendant. Also, the Defendant himself listed T[ro]y Ross as a potential witness in its Rule 15.1 filing . . . . Therefore, it is clear that the Defendant had notice of the potential that T[ro]y Ross might be called at trial and was not prejudiced by his testimony.

¶11 Apart from his general right to know in advance the identity of the witnesses the state might call and the substance of their anticipated testimony, Hunter has alleged no specific resulting prejudice—as, for example, had he been surprised by and unprepared to meet some critical portions of Ross's testimony. In the absence of such an allegation of specific harm, the trial court was entitled to conclude Hunter had failed to establish any actual prejudice resulting from counsel's failure to object when the state called Ross to testify. As a result, the trial court could properly find Hunter had not alleged a sufficiently colorable claim of ineffective assistance to warrant an evidentiary hearing.

¶12 We find no abuse of the trial court's discretion in denying post-conviction relief. *See Watton*. Although we grant the petition for review, we, too, deny relief.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge